Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

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10 EAST 40TH STREET BUILDING, INC.,

Petitioner,

against

CHARLES CALLUS, et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below.

The opinion of the District Court for the Southern District of New York dismissing the complaint after trial without a jury is reported in 51 F. Supp. 528 (R. 345-356). The unanimous opinion of the United States Circuit Court of Appeals for the Second Circuit reversing the judgment of the trial court is not yet officially reported but appears unofficially in 7 Wage Hour Rept. 1208, 8 Labor Cases, par. 62,445 (R. 381-386).

Jurisdiction.

The judgment of the United States District Court for the Southern District of New York dismissing the complaint upon the merits was rendered June 3, 1943 (R. 372). The decision of the United States Circuit Court of Appeals for the Second Circuit reversing the judgment below was

handed down December 12, 1944 (R. 381). The Court modified the first two sentences in its opinion slightly on December 21, 1944 (R. 386). The Circuit Court issued and filed its order for a mandate to the District Court on December 27, 1944 (R. 386-387), and subsequently granted a 30-day stay for petitioner to make application for writ of certiorari.

Jurisdiction has been invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Pet. for Writ, pp. 9, 15-16).

Questions Presented.

Petitioner's statement of the questions presented is somewhat argumentative and conclusory in form with the result that it does not fairly state the issues upon which certiorari is sought (Pet. for Writ, pp. 9-10).

Concisely put, the question presented is whether, under the facts of this case, plaintiffs were "engaged in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act and entitled to its benefits.

Statement.

In view of petitioner's default in presentation of a statement of the case, respondents present the following brief summary statement:

Defendant, the owner of a 48-story and basement building at 10 East 40th Street, New York City, employed plaintiffs as building maintenance employees to maintain and operate various services and facilities for the use and benefit of all of the tenants in the building (R. 346, 340-341). Included among the tenants at all times were executive and sales offices of 20 manufacturing and mining companies, occupying 25.8% of the gross rentable area or 29% of the occupied space; offices of sales agents for 17 manufacturing

and mining concerns occupying 9.3% of the gross rentable area or 10.4% of the occupied space; offices of 10 advertising agents, publicity firms and trade organizations occupying 6.6% of the gross rentable area or 7.4% of the occupied space; offices of a number of export and import concerns, engineering and construction firms, the United States Employment Service and various investment, finance, credit and similar businesses (R. 346-347).

The manufacturing and mining companies used the rented space for executive and administrative direction of the manufacture and distribution of goods across state lines, from factories and mines throughout the United States, including performance of such functions and processes as the making of designs, purchasing of raw materials, taking of specifications for goods to be produced to order, planning and guidance of the productive processes, selling, advertising and other activities integrally related to the production of goods for and the marketing of goods in interstate commerce (R. 25-70, 70-72, 72-78, 78-94, 109-115, 126-131, 140-144, 154-170, 170-175, 180-183, 183-191, 195-200, 203-210, 214-217, 217-219, 222-224, 231-236, 252-253, 258-269, 273-277, 314-319). The advertising agents and publicity and trade organizations, as well as 7 of the manufacturers, used the rented space for designing, preparation and work upon commercial art designs, advertising copy, photographic prints, publicity releases, magazine manuscripts and proofs and similar articles subsequently distributed across state lines, both from the building and, after reproduction, from printing and lithographing plants elsewhere (R. 25-70, 78-84, 94-109, 109-115, 116-122, 151-154, 183-191, 203-210, 211-214, 224-227, 231-236, 258-269, 269-272, 287-290, 314-319, 322-326, 348). The sales agents of manufacturing and mining concerns used the rented space to take orders and forward them to factories and mines located in various states for shipment of goods to various parts

of the country; as a result of their efforts, substantial amounts of merchandise of substantial value were shipped across state lines from various factories, mines and warehouses (R. 122-125, 131-140, 224-227, 236-238, 254-258, 278-282, 319-321, 331-332, 348).

In the operation of its office building defendant employed an average of 50 to 60 maintenance workers, including elevator starters, elevator operators, window cleaners, watchmen, porters, mechanics, handymen and painters (R. 350; Pl. Ex. 1, 342-344). These employees performed such customary duties in connection with the maintenance and operation of the building as the furnishing of heat and hot water; the keeping of elevator, radiator, water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as office furniture and equipment, to and from tenants' premises; protection of the building and tenants' quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; the keeping of the building and tenants' quarters in a clean and habitable condition; renovation of interior parts of the building; and related clerical tasks (Pl. Ex. 1, R. 340-341). All of the tenants in the building regularly and continuously had the benefit of and made use of these various facilities (Pl. Ex. 1, R. 341, 351).

The building elevators were used regularly to carry advertising matter, publicity releases, photographic materials, magazine lay-outs, commercial art work, printers' and lithographers' proofs, Diesel engine parts, Ediphone machines and parts, samples of merchandise for which orders were taken in the building, and office supplies (R. 37, 39, 46, 48, 70, 80, 95, 96, 97, 98, 105, 106, 111, 234, 266, 289, 340; Pl. Ex. 5). Salesmen, buyers, free lance artists, ad-

vertising copy writers, customers, messengers and executives, as well as employees who earned their daily bread in the building, made regular use of the elevators, to transact their business or go to or from their work (R. 42, 44, 111, 130, 135, 185, 186, 189, 262, 265, 350).

Statutory Provisions Involved.

The relevant statutory provisions are Sections 3 (b), 3 (j), 7 (a) and 16 (b) of the Fair Labor Standards Act of 1938 which have been set out in full in petitioner's brief (Pet. for Writ, pp. 16-17).

ARGUMENT

I.

The case at bar involved additional facts not present in *Borella* v. *Borden*, in which certiorari was granted January 2, 1945, and the conclusion of the Circuit Court here based upon such added facts was not inconsistent with any decision of this Court or of the various Circuit Courts of Appeals.

Petitioner in referring to the decision in the Second Circuit in the case at bar has characterized the building in which plaintiffs worked as a typical office building, or a multi-tenanted office building, and urged that prior decisions in the various Circuit Courts conflict with the result here. But this would ignore the fact that the test is not the general character of the building or the nature of the employer's business, but the particular activities conducted there to which the building service employees' functions immediately relate. Compare *Kirschbaum* v. *Walling*, 316 U. S. 517; *Jacksonville Paper Co.* v. *Walling*, 317 U. S. 564; *Warren Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88. The

result must thus depend not upon any general principle but upon the facts of the individual case.

Examination of the record and petition for certiorari in *Borella* v. *Borden*, No. 688, certiorari granted January 2, 1945, indicates that the latter was decided upon the basis of the character of the executive and administrative work carried on in the building there involved by the Borden Company. In the case at bar, on the other hand, there was involved, in addition to manufacturers' executive and administrative work, regular and continuous activity upon the part of some 10 advertising agents, publicity firms and trade organizations, together with 7 of the manufacturing tenants, in the preparation, designing and other productive work *directly in the building* upon commercial art concepts, textile designs, advertising copy, photographic prints, publicity releases, magazine manuscripts and proofs and similar articles.

There can be little question that the various tenants preparing textile designs, taking and developing and printing photographs, working upon advertising copy and publicity releases, editing and laying out magazines and publications, collating and correcting manuscripts and printers' proofs, depicting commercial art conceptions and similar activities, were working upon goods in the formative stages of production. Such items are unquestionably "subjects or articles of commerce". *Western Union Telegraph Co.* v. *Lenroot*, U. S. , decided Jan. , 1945. In each case, further, there was produced in the building, by a necessary process which was the initial step in a series of operations culminating in the production of finished goods for interstate distribution, a "part or ingredient" of such goods. See Section 3 (i) of the Act. Such creative items were not only intended to be, but actually were, regularly shipped across state lines, both in process of preparation and as finally reproduced. Those engaged in

their preparation were producing "for commerce" within the meaning of the Act. *U. S.* v. *Darby Lumber Co.*, 312 U. S. 100, 117-118.

Employees performing "the first step" in a series of operations ultimately culminating in articles that move into commerce have frequently been held to be "engaged in the production of goods for commerce"; and this is true even where the only commodities moving out-of-state are end-products after further processing or handling elsewhere. See *Walling* v. *Peoples Packing Co.*, 132 F. (2d) 236, 240 (C. C. A. 10); *Bracey* v. *Luray Iron & Metal Co.*, 138 F. (2d) 8 (C. C. A. 4); *David* v. *Goodman Lumber Co.*, 133 F. (2d) 52 (C. C. A. 4); *Enterprise Box Co.* v. *Fleming*, 125 F. (2d) 897 (C. C. A. 5). See also *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, indicating that the concept of "production" carries back to the initial stages.

It is hardly subject to dispute that the creative and coordinating functions of editing, art work and advertising in connection with preparing materials for publication and subsequent distribution across state lines is "the production of goods for commerce" within the meaning of the Act. See *Walling* v. *Sun Publishing Co.*, 140 F. (2d) 445 (C. C. A. 6). To hold otherwise would be to nullify the effect of this Court's recent construction of the comprehensive definition of "goods" in the Act. Compare *Western Union Telegraph Company* v. *Lenroot*.

Under the circumstances, there was present in the case at bar a substantial showing of facts sufficient to justify the Circuit Court's conclusion that the various tenants in the 10 East 40th Street building were engaged *directly in the building* in the production of goods for interstate commerce within the meaning of the Act. It follows that the Second Circuit's conclusion that plaintiff's work was necessary to that production was proper

for a reason entirely independent of and without regard to the doctrine of *Borella* v. *Borden*, 145 F. (2d) 63. See *Kirschbaum* v. *Walling*, 316 U. S. 517. This conclusion was in accord with the weight of the evidence and not in conflict with the decisions of the various Circuit Courts of Appeals to which petitioner has referred. Facts such as these were not present in any of the other cases.

II.

In any event the decision of the Second Circuit was not in conflict with the decisions of the various Circuit Courts of Appeals relied on by petitioner.

Petitioner has rested its application for certiorari principally upon the assumed conflict between the decision of the Second Circuit in the case at bar and the decisions of some six other Circuit Courts of Appeals, citing also the New York Court of Appeals. These, according to petitioner (Pet. for Writ, pp. 10-11 and Brief in Support, pp. 19-21), "have uniformly held that maintenance employees in office buildings are not covered by the Act". The fact is that almost without exception all of these decisions were based entirely upon the determination that building service employees are not "engaged in commerce" where tenants in the buildings serviced are so engaged, following the rationale of this Court in *McLeod* v. *Threlkeld*, 319 U. S. 491. In the various appellate decisions relied on by petitioner the court in the course of the opinion usually made clear that there was no contention that the employees in question were engaged in occupations necessary to "production of goods for commerce", nor did the holding reach so far. In the one or two cases where reference was made to the question of "production", the court bottomed its decision upon the insubstantial character of the evidence

as to the activities of the tenants in question or the inconsiderable number of tenants renting space as executive offices in connection with manufacturing or mining conducted at plants elsewhere.

The readiest proof of this fact lies in the words of the courts themselves.

1. *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287 (C. C. A. 5):

> Many of appellee's tenants were engaged in intrastate commerce, but a substantial number of them were engaged, wholly or in part, in some type of interstate business or "in commerce" within the meaning of the Act. None of such tenants nor other persons were engaged in the production of goods of any kind or character in or about the building. None of appellee's tenants were engaged in the production of goods elsewhere, but some of them were agents for concerns so engaged—not in or about the building but generally outside of Texas.

2. *Stoike* v. *First National Bank of N. Y.*, 290 N. Y. 195 (Ct. App. N. Y.):

> It (defendant) contends, however, and the Appellate Division has recognized that this "* * * is not a case where the employee was in anywise engaged in the production of goods for commerce" (264 App. Div. 585, 586). Accordingly, the defendant's argument goes to the narrow question whether the plaintiff, at the time of his overtime employment, was "engaged in" interstate commerce within the intended meaning of Section 7 (subd. a) of the Act.
>
> We are not unmindful that in *Kirschbaum* v. *Walling* (*supra*), the provisions of Section 7 (subd. a), with respect to "the production of goods for commerce," have—because of the liberal definition of the phrase "production of goods" (Sec. 3 [j])—been given a broad construction. But that case, as

we view it, is not controlling here where the plaintiff does not claim we are dealing with a problem involving "the production of goods for commerce."

3. *Tate* v. *Empire Bldg. Corp.*, 2 Wage Hour Cases 472 (W. D. Tenn.), aff'd per curiam 135 F. (2d) 743 (C. C. A. 6):

> The interstate activities of the tenants before me in the present case are at best borderline activities if the suing employees were employees of the tenants, and moreover the tenants in the entire office building whose business is claimed to bring their employees within the coverage of the Act number five, an inconsiderable percentage of the whole.

4. *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817 (C. C. A. 5):

> A few of the offices are used for executive offices of companies engaged in interstate business. Thus there were three railroad ticket agencies; and *Merry Bros. Brick and Tile Company* produces brick and tile for interstate shipment at its plant elsewhere in Augusta, and *Southeastern Bituminous Company* produces goods for commerce in a nearby plant.
>
> As the record stands after settlement thereof by the district judge, there is no evidence that any goods are produced for commerce in the building itself. The building employees are not doing anything that is necessary to or even directly contributes to such production. * * * If the office men of Merry Bros. Brick and Tile Company and Southeastern Bituminous Company can be said to be producers of goods, the appellants, employed by another employer with no especial reference to the business of any tenant, cannot be held to be so engaged because these tenants were producing goods elsewhere.
>
> * * * We adhere to the decision in *Johnson* v. *Dallas Downtown Devel. Co.*, 132 F. (2d) 287.

5. *Rucker* v. *First National Bank of Miami, Okla.*, 138 F. (2d) 699 (C. C. A. 10):

> But the facts before us which bear upon the phrase "production of goods for commerce" are only remotely analogous to the facts in the *Kirschbaum* case. The executive and administrative offices of the mining and smelting company were located in the building serviced by the elevator operators, and this company was doubtless engaged in the production of goods for commerce, but it is not shown on this record whether any of the goods were produced in the building, or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of the goods. The same is true of the chat and crushed rock company, and the abstract company, which produced abstracts, some of which were shipped in interstate commerce. In any event, the relationship is not shown to be "close and immediate." Under these facts it cannot be said that the activities of the elevator operators were an essential part of, or necessary to, the production of goods for commerce.

6. *Rosenberg* v. *Semeria, et al.*, 137 F. (2d) 742 (C. C. A. 9):

> Here, as there, the employees concerned are not in any sense engaged in production nor are their activities integrated with the production of goods. Cf. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. The sole argument made on their behalf is that they are "engaged in commerce."

7. *Convey* v. *Omaha National Bank*, 140 F. (2d) 640 (C. C. A. 8):

> Plaintiff, appellant here, does not claim that he and the other employees on whose behalf this suit was filed were engaged in production for interstate commerce . . .

> With but little dissent the decisions of other courts are in accord with our conclusion that appellant and the other building service employees here involved are not covered by the Act when employed in servicing a building in which no production for interstate commerce is carried on.

The clear distinction of the above decisions, indicating no conflict with the doctrine of *Borella* v. *Borden*, was not brought to this Court's attention in the brief in opposition to the petition for certiorari in the latter case.

Since it would appear that there is no essential conflict between the decisions of the various Circuits and the decision of the Second Circuit in the case at bar, founded upon a different doctrine, the petition for a writ should be denied.

III.

The employer having stipulated and the trial court having found that the work of the employees here was carried on for the benefit of the various tenants in the building to enable the latter "to conduct their activities conveniently and efficiently", and there being no dispute that the tenants in the building were substantially engaged there in interstate commerce, it follows that the employees were closely enough related to the activities of the tenants as to be likewise engaged in commerce.

There is a further and independent reason why certiorari should be denied in the case at bar. The defendant does not dispute that a substantial number of tenants, occupying a substantial portion of the rentable area of the building, was there regularly and continuously engaged in business activities constituting interstate commerce within the Act's definition in Section 3 (b). The Second Circuit,

following the decisions of other circuits referred to above, and adopting the rationale of *McLeod* v. *Threlkeld*, 319 U. S. 491, nevertheless has concluded that plaintiffs were not "engaged in commerce" (R. 386).

But there was in the case at bar a factor sufficient to permit distinction between the state of the record in this case and the various cases which, at first blush, would seem to present substantial authority for a holding adverse to the employees upon this point. It was stipulated here that in all of their activities, as carried on in the 10 East 40th Street building, the "tenants regularly and continuously had the benefit of and made use of the facilities" supplied by the building service employees, including heat and hot water, elevator service, electric lighting and various other facilities essential to the maintenance of clean, safe and habitable working quarters (Pl. Ex. 1, R. 341). And the trial court further found that "the labor of defendant's building service employees has been performed • • • to enable the various tenants to conduct their activities conveniently and efficiently" and the tenants "regularly and continuously had use of and derived the intended benefit from the various facilities so provided" (Finding 11, R. 351). In this state of the record the plaintiffs thus made out a *prima facie* case establishing that their employment was sufficiently closely related to the activities of the various tenants in commeree as to be deemed an essential part of commerce itself as carried on by the tenants and to entitle them to the benefits of the Act. *Overstreet* v. *North Shore Development Co.*, 318 U. S. 125; *Slover* v. *Wathen*, 140 F. (2d) 258 (C. C. A. 4); *Walling* v. *Sondock*, 132 F. (2d) 77.

Under the circumstances, the difficulty presented by the difference in language of the definition of "commerce" in Section 3 (b) as compared with the definition of "production" in Section 3 (j) was here obviated and the Second

Circuit could properly have rested its determination upon a ground free from conflict with the result in *McLeod* v. *Threlkeld* and the various Circuit Court decisions referred to above.

IV.

There is here presented no novel, substantial or important question of construction of a federal statute not heretofore determined by this Court, nor is the decision of the Second Circuit in conflict with applicable decisions of this Court or of the other circuits.

CONCLUSION.

No adequate reason is set forth in the petition for the granting of a writ of certiorari and application therefor should be denied.

Respectfully submitted,

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